CARNEYS POINT TOWNHIP
MUNICIPAL COURT
COUNTY OF SALEM
STATE OF NEW JERSEY
DOCKET NO: 11-08
A.D. #_____

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
v.	)	OF
	)	HEARING
FRANCIS OSEI-AFRIYIE	)	
	)	
Defendant.		

PLACE: Carneys Point Township
Joint Municipal Court
Carneys Point, NJ 08069

Date: July 16, 2010

Before:

HONORABLE DAVID E. KRELL, P.J.M.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE
212 Lone Tree Drive
Camden, DE 19934

APPEARANCES:

JOHN HOFFMAN, ESQUIRE

(Prosecutor for the Township of Carneys Point)
Attorney for the State of New Jersey

THOMAS J. SHUSTED, JR. ESQUIRE
(Law Office of Thomas J. Shusted, Jr.)
Attorney for Defendant

Transcriber Barbara Morris
DORMAN TRANSCRIBIBG AND
RECORDING SERVICES
P.O.Box 129
Gibbsboro, NJ 08026
Phone: (856) 435-7172
Fax: (856) 435-7124
E-Mail: dianadoman@comcast.net
Sound Recorded
Audio Operator: D. Quirk

Direct Testimony of trooper Cresong

Q. You indicated in your report – I believe you prepared the report that Mr. Shusted put into evidence that you determined that the defendant was unable to give a breath sample to the trooper. You included that in your report, correct?

A. Yes

Q. What - - allowed you to make that determination? What did you base that determination upon?

A. That was based on my- - sergeant at the time gave the Alcotest. He gave two samples that didn't meet the liters required to equal a positive test. The machine automatically shuts you off.
Q. After eleven times, is that not correct?

A. Eleven times is the – as far as it will go up to. It is up to the - - to the operator of that machine to make the determination if he's given a valid sample or not.
Q. And were you there when that determination was made?

A. Yes, sir.

Q. Did you confer with the sergeant who was operating the Alcotest whether or not a valid sample was being provided?
A. I did. I concurred with Sergeant Smith that the defendant was not trying to give valid samples.

Q. And what did you base that observa- - or what did you observe that allowed you to draw that particular opinion?

A. Through- - very little needs to be given into that machine as far as to- - fill a liter up- - the - - the Alcotest up with air.

Mr. SHUSTED: Your Honor, I'm going to have to object to that. I understand that it's a 104 hearing , but I don't think that this trooper is qualified to give the Alcotest at the time of the stop, so he really can't –I don't believe that he can testify - -

THE COURT: Well, you can bring that in on cross

MR. SHUSTED: Okay.

BY MR. HOFFMAN:

Q. Are you certified to operate the Alcotest?

A. I am now, I was not at the time.

Q. And when did you receive your certification?

A. Approximately three, four months ago.

Q. Okay. After receiving your certification, would you draw any different opinion than you did on the date in question?
A. No.

Q. Now, refreshing your recollection back to the date in question, you indicated that the defendant was unable to give the breath sample?
A. Correct.
Q. Was he unable to give or was he refusing to give it?

A. According - - I can't make that determination. By the liters of the - - by how much he was trying to blow in there--that was - - that was - - that was the decision made by Sergeant Smith. I could not make that decision just by viewing him. He was- - I had a view of how much was going across. It wasn't - - they have asterisks that go across Alcotest to let you know how hard someone is blowing. He was not trying to- - they were not going across smoothly. He didn't seem like he was - - he was very antagonistic the whole time, kind of playing games. I think that's what the - - that's the determination the sergeant made at the time.

Q. And you questioned the defendant, didn't you, on this night?

A. I did, sir.

Q. And was he cooperative?

A. No, sir.

Q. Did he answer your questions?

A. With - - he answered them, but through, you know, multiple times of trying to get the answer out of them.

Q. And he refused to answer several questions on the drunk driving questionnaire that we submitted into evidence, correct?

A. Correct.

Q. And based upon his demeanor on that evening, you and the Sergeant determined that he was uncooperative in giving the breath sample.

A. Correct.

CROSS EXAMINATION BY MR. SHUSTED

Q. Trooper, how many DWI arrests have you done in your carrer?

A. Fifteen plus, twenty plus.

Q. Okay. Have you issued- - have you issued refusal tickets before this gentleman?

A. Yes.

Q. Okay. And when you issued these tickets for refusal, it's fair to say sometimes people just don't even want to get on the box, correct?

A. Correct.

...

Q. And just so we're clear, Officer, in your experience, you've observed times when defendants give a fake test or half –test, half blow, don't really try to do that through the - - on the box, correct?

A. Correct.

Q. All right. And in your report here, you don't have any notations saying that Mr. - - the defendant here was faking in regards to trying to give the sample?

A. In my report, no.

Q. All right. And it's also fair to say that your report, which we admitted into evidence as D-6, when you make the discretionary call for the refusal, your very words say he is unable to do so.

A. Correct.

Q. Okay. And is it fair to say that something did register on the Alcotest as far as a sample breath, as well as a time period that he attempted to blow?

A. Correct.

Q. All right. And when you asked him the predicate questions before he took the test, he answered yes?

A. As far as the standard statement will he take the breath test?

Q. Correct.

A. Yes.

Q. Okay. So - - and so he – and he approached the box. He didn't say, hey, I'm not going to do it. I'm ready to- - I'm - - his attitude was I'm ready to show you that I'm not intoxicated?

MR. HOFFMAN: Well if you could answer that question.

MR. SHUSTED: All right.

THE COURT: Did- - well, first of all, did he ever say that to you?

WITNESS: That he - - that he was ready to take the test?

THE COURT: What the lawyer just said?

WITNESS: No Sir.

THE COURT: Did he say to you, let's go. I'm ready to take the test- -

THE WITNESS: No, Your Honor, he did not.

THE COURT: - - to show you I'm not intoxicated?

THE WITNESS: No, he did not, Your Honor

MR. SHUSTED: All right.

Q. Just so we're clear, it's Sergeant Smith who made the decision to stop the test.

A Correct.

Q. And you've had you training now on Alcotesting, correct?

A. I do now, yes, sir.

Q. You didn't at that time?

A. Correct.

Q. And you know that subsequent having that training, that the Alcotest can receive eleven tests before it's determined that there's a refusal that's issued on the Alcohol Influence Report?

A. Correct.

Q. And the word refusal, pursuant to the machine, was never issued on this particular test?

A. Correct.

Q. The refusal ticket is only issued because Sergeant Smith, in his discretion, decided to stop the box after two tests.

A. Correct.

MR. SHUSTED: That's all I have, Judge.

....

CERTIFICATION

I, Barbara Morris, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 54, index numbers 5588 to 7207, and tape number 55, index numbers 0001 to 1273 dated July 16, 2008, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Signed---------- Date: 8/26/08
A.O.C. #499
DIANA DOMAN TRANSCRIBING

APPENDIX G

CARNEYS POINT TOWNSHIP
MUNICIPAL COURT
COUNTY OF SALEM
STATE OF NEW JERSEY
DOCKET NO:
A.D. #_____

STATE OF NEW JERSEY,	)	
	)	TRANSCRIPT
v.	)	OF
	)	HEARING
FRANCIS OSEI-AFRIYIE	)	
	)	
Defendant.		

PLACE: Carneys Point Township
Joint Municipal Court
Carneys Point, NJ 08069

Date: September 11, 2010

Before:

HONORABLE DAVID E. KRELL, P.J.M.C.

TRANSCRIPT ORDERED BY:

FRANCIS OSEI-AFRIYIE
212 Lone Tree Drive
Camden, DE 19934

APPEARANCES:

EDGAR HATHAWAY, ESQUIRE
(Prosecutor for the Township of Carneys Point)
Attorney for the State of New Jersey

THOMAS J. SHUSTED, JR. ESQUIRE
(Law Office of Thomas J. Shusted, Jr.)
Attorney for Defendant

Transcriber Barbara Morris
DORMAN TRANSCRIBIBG AND
RECORDING SERVICES
P.O.Box 129
Gibbsboro, NJ 08026
Phone: (856) 435-7172
Fax: (856) 435-7124
E-Mail: dianadoman@comcast.net
Sound Recorded
Audio Operator: C. Millis

INDEX

Page
Review of Charges..... 5

Plea Entered..... 9

Plea Accepted.....10

Colloquy
(Court in session)

THE COURT: Allright. Francis Osei-Afriyie?
A SPEAKER: Judge, when we- - may the Prosecutor approach on that? I think we 're- -
THE COURT: Yeah, sure.

(Other Matters Head)
THE COURT: Mr. Shusted, are you ready?
MR. SHUSTED: We are, Your Honor.
THE COURT: All right. Well I do need Mr. Hathaway. I don't know where he got to.
THE CLERK: He went back in the- -
THE COURT: Well, we can proceed until he gets here. Let me have your appearance, please.
MR.SHUSTED: Good afternoon, Your Honor. Thomas Shusted, Jr., on behalf of defendant. Your Honor- -
THE COURT: And the defendant is Francis Osei-Afriyie?
MR. SHUSTED: Osei- -
DEFENDANT: Yes, please.
MR. SHUSTED: - - yes.
THE COURT: Allright. Would you raise your right hand, sir?
THE COURT: Your name and your address?
THE DEFENDANT: Francis Osei-Afriyie. And my new address is 212 Lone Tree Drive.
MR. SHUSTED : LONE- - the word- - the word three- - the word three- - the word numerical three Drive.
DEFENDANT:Yeah ,yeah. No, no.

THE COURT: All right. Mr. Shusted, we had conferences. Let me see if I understand where we are going here.

We have a 4-50 and a refusal. We have an open alcohol container. We have a careless driving and following too close. My understanding is that the defendant is pleading guilty to the refusal, that you want to put- - place on the record certain issues that you feel may be relevant depending on how the Chun decision plays out, which may give you the right to come back and ask me to vacate that guilty plea.

As I understand, you can expound on this if you feel you need to.

There is an issue with respect to the taking of the breath that the defendant attempted to take a breath sample, but he was not able to get the full volume that's needed, which I believe is 1.2 liters. And he only produced how much, according to the readings?
MR. SHUSTED: .09 for one and 1.0 for the second one.
THE COURT: Okay. And we are aware of Judge King's report which raises a question as to whether the way that the machine is programmed that requires 1.2 liters is, in fact, fair to the defendant. He- - he in his report, as I read it, suggested that there be a distinction between the general population and those- - that set of individual defendants who take the breath test with the Ascotest are female over 65 who may not be able to produce 1.2, and I believe 1.0 is the amount of that.

So what you want to be able to do is enter the plea, reserving the right to come in and use any ammunition out of the Chun decision from the Supreme Court that you can to try to vacate or make an argument that he did give an adequate breath sample?
MR. SHUSTED: That's correct, Your Honor. And –and just as your is aware, although you may have seen it, I have produced to Mr. Hathaway two reports- - or a two - page report dated June 21st which specifically goes to this particular issue where the physician talks about severe inflammatory esophagitis and other brushings (sic) which- - may prevent him from doing that.

As –as I told him- - as I told the defendant now, he realizes today that he's going to plead voluntarily because as the case law stands now, it is 1.2. That- - the penalties would be stayed and that obviously you would be would be guided, as well as the Prosecutor and myself.
THE COURT: All of us by whatever the Supreme Court does.
MR. SHUSTED: - - by whatever that decision says.
THE COURT: - - in Chun, and we don't know.

MR. SHUSTED: And- - his right - - his right is preserved not only on that decision, but based- - also on medical reports which I've previously gived.

THE COURT: Now, to take it one step further, Mr. Prosecutor, I turn to you now because it's my understanding that without a reading, the physicals and the observations are not sufficient, in your opinion, to prove a 4-50, is that correct?

MR. HATHAWAY: That's correct, Your Honor.

THE COURT: So you're moving to dismiss the 4-50 and other charges?

MR. HATHAWAY: That's right. Yes. And - - and particularly in light of defendant's- -

THE COURT: Plea to the refusal.

MR. HATHAWAY: - - problems that are shown in the doctor's reports.

THE COURT: I think that this is a fair resolution and is in line with the prohibition of plea bargaining that the Supreme Court has reconciled which would not allow the Prosecutor to dismiss the refusal and take a plea only to the 4050 because that would arguably fit into that anomaly and the statute that would only require a three-month suspension to someone who refused as opposed to someone who took the test and was over an 08 (sic) would be facing a seven-month suspension. I - - I'm assuming it's a first offense.?

MR. SHUSTED: It is , Your Honor.

THE COURT: Mr. Osei-Afriyie, how do you plead to a refusal to take a breath test on May 28th, 07?

DEFENDANT: Guilty.

THE COURT: And is the plea voluntary?

DEFENDANT: Yes, please.

THE COURT: Is anybody forcing you to plead guilty.

DEFENDANT: No, no, no

THE COURT: And you understand that this is going to be stayed in order to get a decision from the New Jersey Supreme Court on the Alcotest?
DEFENDANT: Yes.
THE COURT: And did you drive a motor vehicle on May 28th, 07 at approximately 8p.m. on the Turnpike here on Carneys Point at milepost 2.5?
DEFENDANT: Yes.
THE COURT: And you had been drinking prior to driving?
DEFENDANT: Not really. Not at that time. That all- - during the day. About 1:00.
THE COURT: Okay. But- - I- - may be my question was not very artful, but the question is do you- - were you placed under arrest by the trooper on a suspicion of driving under the influence?
DEFENDANT: Yes.
THE COURT: And did they take you to Moorestown Barracks and request that you take a breath test?
DEFENDANT: YES.
THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?
DEFENDANT: Yes.
THE COURT: And that, therefore, that amounts to a refusal.
DEFENDANT: Yes.
THE COURT: All right. But you understand that based on what happens in the Chun case that there mat be something in that opinion from the Supreme Court that would allow your lawyer to come back and argue to me that you may not have been able to give a full sample and that that should be considered by the Court?
DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. I find it's voluntary and there is a factual basis.

I'll stay the sentence pursuant to Chun. The sentence is a $306 fine, $33 costs, $100 DWI surcharge, 210 days revocation of the driving privileges, and twelve hours minimum mandatory attendance IDRC. The other charges are dismissed.

We will notify you in the future to come back and w'll tell you at time whether the sentence goes into effect. I'm told that we may have a decision from the Supreme Court toward the end of this year. I believe the testimony in the case is going to be taking place in the next few weeks. The Special Master appointed by the New Jersey Supreme Court will render a decision by, I believe, October 27th. And no one tells the Supreme Court when to render a decision. So we wait for them to tell us when they are ready to render their decision, but I have a feeling it will be pretty quickly after they get the final reports.

In any event, at this point, the sentence is stayed. You do need to sign some paperwork at the window. And if you move, you need to inform us and your lawyer so we know where to find you. Any questions, sir?
DEFENDANT: No—no, sir.
THE COURT: All right. See the Court Administrator. Thank you.
MR. SHUSTED: Thank you, Judge.
THE COURT: Thank you, Mr. Shusted.
MR. HATHAWAT: Thank you, Your Honor.
THE COURT: And thank you, Mr. Hathaway.
DEFENDANT: Thank you.
THE COURT: I - - now you can all be rested for tomorrow. Do we have- - have you looked at tomorrow's list?

(Court Adjourned)

CERTIFICATION

I, Barbara Morris, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape

number 50, index numbers 2745 to 2787, dated September 11, 2007, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Signed---------- Date: 8/26/08
A.O.C. #499
DIANA DOMAN TRANSCRIBING